

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 April 2003

Case No: 2001-BLA-0277

In the Matter of

VERNON LAWSON,
Claimant

v.

STRAIGHT CREEK MINING CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Edmond Collett, Esquire
For the claimant

Scott White, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On December 14, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on August 12, 2002 in Harlan, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. the length of the miner's coal mine employment;
2. whether the miner has pneumoconiosis as defined by the Act and regulations;
3. whether the miner's pneumoconiosis arose out of coal mine employment;
4. whether the miner is totally disabled;
5. whether the miner's disability is due to pneumoconiosis;
6. the number of the miner's dependents for purposes of augmentation of benefits;
7. whether the evidence establishes a change in conditions within the meaning of Section 725.309.

The employer also contests other issues that are identified at line eighteen on the list of issues. (DX 43). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Vernon Lawson, was born on April 24, 1934 . Mr. Lawson married Barbara Johnson on November 23, 1968, and they currently reside together. (DX 1, 7; Tr. 12). Therefore, I find that Claimant has one dependant for augmentation purposes.

Claimant testified that his last full year of coal mine employment was with Straight Creek from 1972 to 1989. He stated that he worked around the tippie, loading unit trains and hauling a powder crew. He also worked moving equipment, driving a truck and operating a bulldozer. Claimant stated that he breathed in a lot of dust while performing these duties. After leaving Straight Creek, Claimant worked for ten months hauling coal in a truck for Yearly Trucking Company. (Tr. 18-27).

Mr. Lawson filed his first application for black lung benefits on February 6, 1990. That claim was denied on August 8, 1991 and was administratively closed on August 27, 1992. (DX 42). Claimant filed a second application for benefits on April 6, 1994. His second claim was denied on September 15, 1994 and was administratively closed on December 5, 1994 (DX 41).

Mr. Lawson's current application for black lung benefits was filed on August 23, 1999. (DX 1). The claim was denied by the District Director on December 10, 1999. (DX 15). After submission of additional evidence and an informal conference, the Director again denied benefits. (DX 36). Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 36).

At the hearing, Mr. Lawson testified that he had problems breathing when he worked for Straight Creek and Yearly. He stated that he can't walk much because of shortness of breath. He has trouble sleeping because of coughing and a smothering feeling. Claimant testified that his shortness of breath is worse on an incline and that he can't walk one hundred yards at a normal pace. He has been treating with Dr. Radar, his family doctor, in Pikeville, for his breathing condition. He testified that he has also had two heart attacks and seven bypasses and is diabetic. (Tr. 27-28). Claimant testified that he smoked about one pack per day for about twenty years until he quit twelve years ago. He currently receives Social Security benefits.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Mr. Lawson alleged thirty-three years of coal mine employment. At the hearing, the employer stipulated to a finding of at least fifteen years and seven months, but not the thirty-three years alleged. (Tr. 10).

The evidence in the record includes Social Security Statement of Earnings, employment history forms, applications for benefits, and claimant's testimony. (DX 2, 6; Tr. 18-27).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

Based upon my review of the record, I place the greatest weight on the Social Security records because they are documented, independent evidence of the miner's coal mine employment. Using these records, I credit Mr. Lawson with coal mine work for each quarter year in which he earned fifty dollars or more as a coal miner. *See Croucher*, 20 BLR at 1-74; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); 20 C.F.R. § 404.140(b).

In 1968, Claimant worked for E&R Trucking for four quarters. I thus credit him with one year of coal mine employment for 1968. In 1969, he worked one quarter for E&R, two quarters for Black Raven and one quarter for Ikerd Bandy. Thus, I credit him for one year of coal mine employment in this period. In 1970, he worked for three quarters for E&R and two for Harry Philpot. I credit him for one year for this period. In 1971, Claimant worked for three quarters for Harry Philpot. Thus, I credit him with three-fourths of a year of coal mine employment in 1971. From 1977 until 1989, Claimant was employed for full years with Straight Creek. Thus, I credit him with thirteen years of coal mine employment for this time period. In total, I find that Claimant has established sixteen and three-fourths years of qualifying coal mine employment.

Medical Evidence¹

A. X-ray reports²

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX21	3-14-90	2-15-00	Perme/ BCR/B	Completely negative
DX 22	3-14-90	2-14-00	Wiot/ BCR, B	Completely negative
DX 26	3-14-90	3-6-00	Meyer/ BCR, B	No pneumoconiosis
DX 28	3-14-90	4-1-00	Shipley/ BCR, B	No pneumoconiosis
DX 28	3-14-90	4-15-00	Spitz/ BCR, B	No pneumoconiosis
EX 12	3-14-90	7-23-01	Fino /B	Completely negative
EX 14	3-14-90	7-30-01	Castle / B	Completely negative
EX 16	3-14-90	8-15-01	Renn /B	Completely negative
DX21	5-20-94	2-15-00	Perme/ BCR/B	No pneumoconiosis
DX22	5-20-94	2-14-00	Wiot/ BCR, B	No pneumoconiosis
DX 26	5-20-94	3-6-00	Meyer/ BCR, B	No pneumoconiosis
DX 28	5-20-94	4-1-00	Shipley/ BCR, B	No pneumoconiosis
DX 28	5-20-94	4-15-00	Spitz/ BCR, B	No pneumoconiosis
EX 12	5-20-94	7-23-01	Fino /B	Completely negative
EX 14	5-20-94	7-30-01	Castle / B	No pneumoconiosis
EX 16	5-20-94	8-15-01	Renn /B	No pneumoconiosis
DX9	9-17-99	9-17-99	Baker/ B	0/1; s/p
DX9	9-17-99	10-1-99	Sargent/ BCR/B	No pneumoconiosis
DX21	9-17-99	2-15-00	Perme/ BCR/B	No pneumoconiosis
DX 22	9-17-99	2-14-00	Wiot/ BCR, B	No pneumoconiosis
DX 26	9-17-99	3-6-00	Meyer/ BCR, B	No pneumoconiosis
DX 28	9-17-99	4-1-00	Shipley/ BCR, B	No pneumoconiosis

¹ As Mr. Lawson has two previous claims for benefits, the current application is a refiled claim and Claimant must establish a change in conditions with newly submitted evidence. Thus, only the medical evidence submitted with the current claim has been summarized below.

² A chest x-ray may indicate the presence or absence of pneumoconiosis as well as its etiology. It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 28	9-17-99	4-15-00	Spitz/ BCR, B	No pneumoconiosis
EX 12	9-17-99	7-23-01	Fino /B	Completely negative
EX 14	9-17-99	7-30-01	Castle / B	No pneumoconiosis
EX 16	9-17-99	8-15-01	Renn /B	Completely negative
DX25	2-16-00	2-29-00	Wheeler/ BCR, B	Negative
DX 25	2-16-00	2-29-00	Scott/ BCR, B	Negative
DX 27	2-16-00	3-30-00	Wiot/BCR, B	No pneumoconiosis
DX 28	2-16-00	4-5-00	Meyer/ BCR, B	No pneumoconiosis
DX 28	2-16-00	4-5-00	Perme /BCR, B	No pneumoconiosis
DX 30	2-16-00	4-28-00	Spitz / BCR, B	No pneumoconiosis
DX31	2-16-00	5-4-00	Shipley /BCR, B	No pneumoconiosis
DX 32	2-16-00	5-25-00	Renn / B	No pneumoconiosis
DX 34	2-16-00	7-5-00	Fino / B	Completely negative
EX 6	2-16-00	2-26-01	Castle / B	No pneumoconiosis

B. Pulmonary Function Studies³

<u>Exhibit/Date</u>	<u>Physician</u>	<u>Age Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁ FVC</u>	<u>Tracings</u>	<u>Comments</u>
DX 9 9-17-99	Baker	65 63 ½"	2.05	3.40	71	69%	Yes	
DX 23 2-16-00	Dahhan	65 160 cm	1.92 1.96*	2.79 2.80*	.58 30*	70% 70%	Yes	

*denotes testing after administration of bronchodilator

³ The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is employed to measure the level of the miner's disability. The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1). *DeFore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

C. Arterial Blood Gas Studies⁴

Exhibit	Date	Physician	Resting/ pCO ₂ pO ₂		Exercise	Comments
			pCO ₂	pO ₂		
DX 9	9-17-99	Baker	39.8	91.9	Resting	No exercise test because of ischemic heart disease
DX23	2-16-00	Dahhan	37.2	79	Resting	Test terminated due to fatigue
			39.4	80	Exercise	

D. Narrative Medical Evidence

Dr. Glen Baker examined Mr. Lawson on September 19, 1999. He reported around thirty-five years of coal mine employment, and a smoking history of one pack per day from age fifty-four to seventy-nine. The physician noted a history of wheezing, chronic bronchitis, heart disease, diabetes, and myocardial infarctions. He documented Claimant's complaints as sputum production, wheezing, dyspnea, cough, chest pain and ankle edema. Dr. Baker performed a chest x-ray, which he read as negative for pneumoconiosis. He also performed a pulmonary function study, which the physician noted evidenced a mild obstruction. An arterial blood gas study was within normal limits. Dr. Baker diagnosed chronic obstructive pulmonary disease, which he attributed to smoking and coal dust exposure. He also diagnosed chronic bronchitis, based on a history of cough, sputum and wheezing, and attributed this disease to smoking and coal mine employment. Dr. Baker determined that Mr. Lawson has a mild impairment and retains the respiratory capacity to perform his last coal mine employment. (DX 9).

Claimant was examined by Dr. A. Dahhan on February 16, 2000. The physician noted that the miner claimed thirty-five years of coal mine employment, and that he smoked one pack per day from age twenty until he quit in 1989 after a heart attack. Dr. Dahhan noted complaints of daily productive cough, frequent wheeze, and dyspnea on exertion such as one flight of stairs. He noted a history of diabetes, heart attack and coronary bypass surgery. Dr. Dahhan performed an arterial blood gas study, which he found within normal limits, both at rest and exercise. He also performed a pulmonary function study, which evidenced a mild reversible obstructive defect based on an improvement with bronchodilators. Dr. Dahhan stated that overall the studies show

⁴ A blood gas study is designed to measure the ability of the lung to oxygenate blood. The initial indication of a miner's impairment will most likely manifest itself in the clogging of alveoli, as opposed to airway passages, thus rendering the blood gas study a valuable tool in the assessment of disability.

normal respiratory mechanisms. The physician also performed an x-ray which he read as negative for pneumoconiosis. Dr. Dahhan also reviewed the employer's record in this case, including Dr. Baker's examination report, Dr. Sargent's x-ray interpretation and the record of the previous claims. Based on his examination and review, Dr. Dahhan determined that there are insufficient findings to justify a diagnosis of coal workers' pneumoconiosis, based on normal testing results. He determined that there are no objective findings of any pulmonary impairment based on normal findings in the respiratory system. He stated that from a respiratory standpoint, Claimant is capable of his previous coal mine employment. The physician stated that Claimant has coronary artery disease, post-bypass surgery and diabetes, which are not caused or related to his coal mine employment. Dr. Dahhan is board certified in Internal Medicine and Pulmonary Medicine. (DX 23). Dr. Dahhan was deposed and testified regarding his examination of Mr. Lawson. He discussed the medical tests performed to diagnose coal workers' pneumoconiosis, the various testing functions and the results he would expect to see with pneumoconiosis. (EX 18).

Claimant's medical records from Pineville Community Hospital were submitted as evidence in this claim. These records include an admission on May 29, 2000 for chest pain, a March 12, 1990 myocardial infarction and notes of checkup examinations following these admissions. The records note that Mr. Lawson has coronary artery disease and chronic obstructive pulmonary disease due to tobacco abuse. These records also include treatment notes from Dr. Radar regarding Claimant's treatment for diabetes and the results of various testing. (DX 35, 40A).

Dr. Peter Tuteur performed a review of the medical evidence submitted in this claim and prepared a report of his findings. Dr. Tuteur noted that Claimant had around twenty-six to thirty-five years of coal mine employment and smoked one pack per day from 1954 until at least 1989. He noted that the miner has problems with breathlessness, suffers from diabetes and had a myocardial infarction and bypass surgery in 1991. Dr. Tuteur evaluated all of the medical evidence and determined that there is no information that would point to a diagnosis of coal workers' pneumoconiosis. He determined that Claimant has cigarette smoke induced bronchitis, based on daily cough and intermittently abnormal physical examinations. He noted that this condition is unrelated to Claimant's coal mine employment. Dr. Tuteur stated that Claimant's most significant problem is his coronary artery disease, complicated by diabetes. Dr. Tuteur determined that Claimant does not have coal workers' pneumoconiosis and that he has only a moderate impairment of his pulmonary function. (EX 1). Dr. Tuteur is Board-certified in Internal Medicine and Pulmonary Medicine. (EX 2). In a deposition, Dr. Tuteur discussed his qualifications and further discussed the findings he relied upon in making his determinations. (EX 10).

Dr. Joseph Renn reviewed the medical records in this case and prepared a report of his findings. Dr. Renn noted coal mine employment from 1963 until 1989, and a varying smoking history ranging from fifteen to thirty-five pack years. The physician noted a history of dyspnea and a myocardial infarction in 1991. Dr. Renn determined that Claimant has chronic bronchitis and pulmonary emphysema due to tobacco smoking, and not caused by exposure to coal dust.

He stated that considering only the respiratory system, Claimant is not total disabled, but considering the whole man, he is totally disabled. (EX 3). Dr. Renn is Board-certified in Internal Medicine and Pulmonary Disease. (EX 4). In a deposition, Dr. Renn discussed his qualifications and reviewed the medical evidence. He discussed the physical findings necessary for a diagnosis of pneumoconiosis that were not found in the records. (EX 11).

Dr. Gregory Fino prepared a report after reviewing Claimant's medical records. Dr. Fino noted approximately twenty-one years of coal mine employment, and discussed the x-rays, pulmonary function studies, office records and other records that he reviewed. Dr. Fino determined that Claimant has a mild obstructive ventilatory abnormality, which is not disabling and is due to cigarette smoking. He stated that this diagnosis was based on the presence of both large and small airway obstruction. Dr. Fino stated that the miner is not disabled from a respiratory standpoint, but is disabled as a whole man because of his coronary artery disease, a condition unrelated to his coal mine employment. (EX 5). Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. (EX 7). In a deposition, Dr. Fino discussed his qualifications, and his review of the medical evidence, including the physical findings of pneumoconiosis that were not present. (EX 11).

Dr. James Castle reviewed Claimant's medical evidence and prepared a report of his findings. Dr. Castle found that Claimant had thirty-five years of coal mine employment, and twenty-five pack years of smoking, beginning at age twenty and ending in 1989 with a heart attack. The physician found no evidence of pneumoconiosis, based on the radiological evidence, pulmonary function studies that showed a mild obstructive abnormality or were normal and normal arterial blood gas studies. Dr. Castle determined that Claimant does not suffer from coal workers' pneumoconiosis because he does not have the physical or radiological findings of the disease. He stated that the miner retains the pulmonary capacity for his last coal mine employment and is not totally disabled from a respiratory standpoint. The physician noted that it is possible Claimant is totally disabled from coronary artery disease, which is unrelated to his coal mine employment. (EX 6). Dr. Castle is Board-certified in Internal Medicine and Pulmonary Disease. (EX 8).

DISCUSSION AND APPLICABLE LAW

Duplicate Claim

Because Mr. Lawson filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates “a material change in condition.” 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether “a material change in conditions” has occurred. Because Mr. Lawson last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Sixth Circuit has adopted the Director’s position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement that previously was adjudicated against him. If a claimant establishes the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). See *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

Applying the *Ross* standard, I must review the evidence submitted subsequent to September 15, 1994, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Mr. Lawson in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If Claimant establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of “pneumoconiosis” and they provide the following:

(a) For purposes of the Act, ‘pneumoconiosis’ means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or ‘clinical,’ pneumoconiosis and statutory, or ‘legal,’ pneumoconiosis.

(1) Clinical Pneumoconiosis. ‘Clinical pneumoconiosis’ consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. ‘Legal pneumoconiosis’ includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease arising out of coal mine employment’ includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, ‘pneumoconiosis’ is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. The record contains thirty-six interpretations of four chest x-rays. Of these interpretations, 35 are negative and another, marked “0/1,” is not positive for pneumoconiosis. In addition, a CT scan was performed on February 18, 2000. All of the physicians who examined it found no evidence of pneumoconiosis.

Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

In this claim, there are no positive interpretations of the x-rays. In addition, there are numerous negative readings by highly qualified physicians. Because the negative readings constitute the entirety of interpretations and are verified by highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and

718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. See *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director, OWCP*, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. See *Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. See *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

Dr. Baker diagnosed chronic obstructive pulmonary disease due to smoking and coal dust. This diagnosis fits the requirements of the legal definition of pneumoconiosis, as the physician diagnosed a respiratory disorder due to coal mine employment. However, I find that Dr. Baker's opinion is not documented as it fails to explain any rationale for his diagnosis, particularly in light of a negative x-ray and other essentially normal testing. Because it is not documented or reasoned, I give no probative weight to Dr. Baker's opinion.

Dr. Dahhan examined the miner and found no objective findings to support a diagnosis of coal workers' pneumoconiosis. He based his determination on essentially normal testing results. Dr. Dahhan also explained the tests performed and described the results that would indicate pneumoconiosis. I find his opinion is documented and well reasoned and give it probative weight on this issue.

Drs. Tuteur, Renn, Fino, and Castle all reviewed Claimant's medical evidence and determined that there are no objective findings to support a diagnosis of coal workers' pneumoconiosis. These physicians all explained the testing they relied upon and explained the rationale for their conclusions. Thus, I give probative weight to the opinions of these four physicians.

Considering all of the medical opinions, I must find that the overwhelming weight of the evidence fails to establish the existence of pneumoconiosis.

As the evidence does not establish the existence of pneumoconiosis, this claim cannot succeed. Regardless, even if the evidence had established this element, it fails to prove that claimant has a totally disabling respiratory impairment, another requisite element of entitlement.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.⁵

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV₁ as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited “poor” cooperation

⁵ A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A “non-qualifying” test produces results that exceed the table values.

or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

The record contains the results of two pulmonary function tests. Neither produced qualifying values under the Act.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

The record contains the results of two arterial blood gas studies. Neither test produced qualifying values under the Act.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A “documented” opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient’s history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director, OWCP*, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A “reasoned” opinion is one in which the underlying documentation and data are adequate to

support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In earlier case law, the Board held that an administrative law judge may accord less weight to a consulting or non-examining physician's opinion on grounds that he or she does not have first-hand knowledge of the miner's condition. *Bogan v. Consolidation Coal Co.*, 6 B.L.R. 1-1000 (1984). *See also Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996) (the administrative law judge acted within his discretion in according less weight to the opinions of the non-examining physicians; he gave their opinions less weight, but did not completely discredit them). A non-examining physician's opinion may constitute substantial evidence, however, if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984). Indeed, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board cited to the Fourth Circuit's decision in *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997) and held that it was error for the administrative law judge to discredit a physician's opinion solely because he was a "non-examining physician." Also, in *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___ (2001), the Board cited to *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) to hold that an administrative law judge may not discredit a medical opinion solely because the physician did not examine the claimant. *But see Sewell Coal Co. v. O'Dell*, Case No. 00-2253 (4th Cir. July 26, 2001) (unpub.) (citing to *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440 (4th Cir. 1997) to hold that opinions of examining physicians, although not necessarily dispositive, deserve special consideration).

None of the physicians, including examining and non-examining physicians, determined that Claimant is totally disabled from a respiratory standpoint. Therefore, I find that Claimant has not established by medical opinions that he is totally disabled.

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Accordingly, the claim of Vernon Lawson must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Vernon Lawson for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.